United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

77-1015

To be argued by
HUGH W. CUTHBERTSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1015

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES APUZZO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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Docket No. 77-1015

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES APUZZO,

Appellant.

BRIEF FOR THE APPELLEE

Issues Presented

I. Whether the trial court erred in admitting evidence of the appellant's prior misdemeanor conviction, which was related to his veracity, for the purpose of attacking his credibility?

II. Whether the trial court erred in permitting the Government to cross-examine its informant regarding the appellant's prior dealings in firearms, where the defense of entrapment was asserted?

III. Whether the prosecutor's closing argument denied the appellant a fair trial?

IV. Whether the Government presented evidence upon which a reasonable mind might fairly conclude beyond a reasonable doubt that the appellant was predisposed to commit the offense charged?

Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut (Zampano, *J.*) on December 14, 1976, after a jury verdict of guilty on October 29, 1976.

On April 7, 1976, a Grand Jury sitting in New Haven, Connecticut, returned a one-count indictment (Criminal No. N-76-54) charging the appellant, James Apuzzo, with having engaged in the business of dealing in firearms without a license from February 26, 1976 to April 6, 1976, in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a). On April 26, 1976, counsel was appointed and Apuzzo entered a plea of not guilty the same day.

On October 20, 1976 a jury was empaneled and trial commenced before Judge Zampano on October 27, 1976. On October 29, 1976, the jury returned a verdict of guilty to the indictment. Apuzzo was sentenced on December 14, 1976, to the custody of the Attorney General for a period of three years, the execution of which was stayed pending this appeal.

Notice of Appeal to this court was filed on December 20, 1976.

Statement of Facts

The Government presented evidence during its case in chief to show that on February 26, 1976 and April 6, 1976 Apuzzo sold a total of ten firearms to two special agents of the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department (A.T.&F.), who were working in an undercover capacity. The Government established that Apuzzo was not licensed to engage

in the b[illegible]ss of dealing in firearms, as required by federal [illegible]. The jury also heard evidence that on two previous occasions, one in November 1975 and one in December 1975, Apuzzo sold a total of three other firearms to one of the agents. In addition, the Government elicited testimony indicating that sometime during the month of October 1975 Apuzzo had arranged to sell one or more firearms to a government agent but had concluded that sale instead with someone else.

Charles A. Petersen, special agent with A.T.&F., testified that on the morning of February 26, 1976, while working in an undercover capacity, he telephoned Apuzzo for the purpose of arranging a purchase of firearms later that afternoon. (Tr. 16-17).* Petersen testified that he and special agent James J. Watterson of A.T.&F., who was also working in an undercover capacity, met with Apuzzo in New Haven as arranged and paid him $275 in government funds for two firearms.[1] (Tr. 17-19). Petersen stated that Apuzzo inquired whether he or Watterson would be interested in an additional thirty pistols, which were used but in good condition. (Tr. 19). Petersen testified that he gave Apuzzo a telephone number in Springfield, Massachusetts where he could be reached and agreed that he would call Apuzzo or that Apuzzo would call him in the event that he obtained additional firearms. (Tr. 22).

Petersen testified that he telephoned Apuzzo on the morning of March 16, 1976 to see whether Apuzzo had obtained any more firearms. Petersen said that on this occasion Apuzzo told him that he had a couple of small handguns which he "got rid of" somewhere else because

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* References marked "Tr." refer to the trial transcript.

[1] The firearms purchased were a Winchester model 101, 12 gauge shotgun and a Mauser model 1891, 7.65 rifle. (Tr. 18).

he didn't think Petersen would be interested in them. (Tr. 22). Petersen further testified that Apuzzo stated that he had a friend who was going to get five .44 Magnum revolvers and that he would let Petersen know as soon as they came in. (Tr. 22-23).

Petersen testified that he had occasion to talk to Apuzzo again on the afternoon of March 22, 1976, at which time Apuzzo indicated that he had not yet obtained the .44 Magnum revolvers, but that Petersen would get them as soon as he did. (Tr. 23).

Petersen testified that he next spoke to Apuzzo on April 5, 1976, was advised by Apuzzo that he had eight firearms to sell for $550 and agreed to meet the next afternoon in New Haven to conduct the transaction. (Tr. 24). Petersen testified that he and Watterson met Apuzzo the next afternoon and purchased the eight firearms [2] for $550, as had been agreed. (Tr. 24-25). Petersen testified that during the transaction Apuzzo advised that he could sell a hundred Colt Cobra revolvers if he had that many. (Tr. 25). Petersen said that Apuzzo stated he was throwing a Smith and Wesson revolver "in with the deal." (Tr. 25). Petersen testified that Apuzzo told them that the firearms which they had purchased were "hot" [3] but could not be traced. (Tr. 25). Petersen testified that Apuzzo then indicated that if someone were

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[2] The firearms purchased were as follows: a Remington model 1100, 12 gauge shotgun; a Browning 12 gauge shotgun; a Sears Roebuck Ranger 12 gauge shotgun; a Winchester model 12, 12 gauge shotgun; a Winchester model 74, 22 caliber rifle; a Winchester model 88, 308 Winchester caliber rifle; a Colt Cobra 38 caliber revolver; and a Smith and Wesson 32 caliber revolver. (Tr. 26-36).

[3] Watterson later explained that "hot" meant stolen. (Tr. 146).

caught with these particular firearms, he would be in trouble. (Tr. 25).

Petersen testified that at the conclusion of the transaction he and Watterson identified themselves as special agents with A.T.&F. and placed Apuzzo under arrest. (Tr. 36).

On cross-examination, Petersen explained that he had initially been introduced to Apuzzo by Robin Bourgeois, who operated as an informant during the investigation. (Tr. 37). Petersen stated that he paid Bourgeois a total of $320 for his assistance in the case, but had made no specific agreement with him with respect to payments. (Tr. 39-40).[4] In response to defense counsel's question, Petersen testified that Bourgeois first introduced him to Apuzzo on November 1, 1975 in Hamden, Connecticut. (Tr. 41). Petersen stated that on this occasion he paid Apuzzo $75 for a Mossberg model 472, 30-30 Winchester caliber rifle, which, a trace by A.T.&F. indicated, was stolen from the Mossberg factory. (Tr. 42, 68). Petersen further testified that he and Bourgeois met Apuzzo again on December 10, 1975 in Hamden and purchased two firearms[5] from him for $275. (Tr. 44-45). With respect to the final sale on April 6, 1976, Petersen testified that Bourgeois had called prior to the sale and indicated that Apuzzo had called him to say that he had eight firearms to sell. (Tr. 51).

On redirect examination, Petersen testified that Apuzzo arrived at the November 1 sale in a white Cadillac and displayed the Mossberg rifle for sale in its fac-

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[4] Petersen testified that Bourgeois originally had wanted no money at all, but accepted payments once he became unemployed. (Tr. 59).

[5] These firearms were a Browning Autofire 12 gauge and a Ruger .44 Magnum rifle.

tory box, explaining that it was new and had been stolen. (Tr. 63-64). Petersen testified that Apuzzo asked him whether he could take any more, to which Petersen replied that he was interested more in street pieces, such as handguns. Petersen stated that Apuzzo then indicated that he thought he could take care of it. (Tr. 64). Petersen further testified that during the transaction which occurred on December 10, 1976, Apuzzo asked him whether he could handle a case of rifles. Petersen stated that he replied that he thought he could and that Apuzzo then told him that he would let Petersen know when he could get them. Petersen testified that Apuzzo also indicated that he might be able to have available for sale such firearms as sawed-off shotguns and machine guns. (Tr. 65).

Special agent James J. Watterson supplied corroborative testimony regarding the transactions on February 26, 1976 and April 6, 1976, which Petersen had described, including all of the conversation between Apuzzo, Petersen and himself. (Tr. 140-147). Watterson further testified that following Apuzzo's arrest, he advised Apuzzo of his constitutional rights and transported him to the United States Marshal's office in New Haven. (Tr. 148). Watterson stated that while awaiting presentment to a magistrate, Apuzzo told him that he had bought the firearms in question from people who advertised in a local magazine. Watterson testified that when he asked Apuzzo whether he would care to provide the names of the people from whom he had purchased the firearms, Apuzzo replied with a smile that they were "wasting each other's time." (Tr. 148-149).[6]

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[6] Prior to receiving the testimony of Watterson, the court held a hearing on Apuzzo's motion to suppress out of the presence of the jury to determine the admissibility of any post-arrest statements made by Apuzzo to Watterson. The court found that Apuzzo's statements were admissible. (Tr. 89-90, 133).

Robin C. Bourgeois was called by the defense as its first witness and testified that he had been paid $320 for his work in the case, although initially he had been expecting no money at all. (Tr. 165, 171). Bourgeois denied, in response to defense counsel's repeated questioning, that he had called Apuzzo at any time during the investigation more than once a week. (Tr. 167, 168, 171, 173). Bourgeois denied, moreover, that he had ever called Apuzzo at the home of his sister or brother-in-law. (Tr. 169, 171).

On cross-examination, Bourgeois testified that he arranged and was present at the sales occurring on November 1, 1975 and December 10, 1975 between Apuzzo and Petersen, but was not present at any of the subsequent transactions. (Tr. 187-188). Bourgeois stated that during the investigation he had not called Apuzzo more than once every one or two weeks. (Tr. 188). Bourgeois testified that prior to the sales on November 1 and December 10, Apuzzo had called him and advised that he had several firearms that he wanted to sell. Bourgeois thereupon contacted Petersen on each occasion to arrange a time and place for the sale. (Tr. 191-192). Bourgeois testified that prior to the sale which occurred on April 6, 1976 Apuzzo had also called him and said that he had a number of firearms to sell but had been unable to locate Petersen. Bourgeois stated that he told Apuzzo that he would attempt to contact Petersen. (Tr. 190). Bourgeois also testified that he had been unsuccessful in attempting to set up an initial transaction between Apuzzo and Petersen during October 1975, because Apuzzo needed money quickly and sold the firearms which he then had to someone else. (Tr. 190-191).

Bourgeois testified, finally, that during his initial conversations with Apuzzo regarding firearms, it was Apuzzo who brought up the subject of firearms by showing

Bourgeois a list of items, which included firearms, that he had to sell. Bourgeois testified that he then notified the authorities and later told Apuzzo to keep him advised inasmuch as he knew individuals who might be willing to purchase his firearms. (Tr. 187, 203-204).

Apuzzo testified on his own behalf and asserted generally a defense of entrapment. (Tr. 210-226). Apuzzo denied ever having met with Petersen on November 1, 1975 and ever having made arrangements prior to that time for the sale of firearms. (Tr. 228). Apuzzo admitted selling Petersen two firearms in December 1975, claiming that the firearms in question belonged to his brother-in-law.[7] Apuzzo denied the conversation to which Petersen had testified. (Tr. 229). Apuzzo further denied having met with Petersen and Watterson on February 26, 1976 and denied the conversations on March 16 and March 22, 1976 to which Petersen had previously testified. (Tr. 226, 229-231). Apuzzo admitted that he sold eight firearms to the agents on April 6, 1976 and claimed that he purchased these firearms from an individual, whose name, address or telephone number he did not know or could not recall, who advertised in a local newspaper.[8] (Tr. 223-224, 236). Apuzzo denied the conversation which Petersen and Watterson testified had transpired during the transaction. (Tr. 231-233). With respect to his conversation with Watterson after he was

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[7] The Government did not contest the fact that these firearms may have belonged to Apuzzo's brother-in-law. (App. 34).*

* References marked "App." refer to the appendix to Apuzzo's brief on appeal.

[8] In this regard, Apuzzo testified that although the newspaper, which was published once a week and sold on newstands, was only three days old at the time of his arrest, he was unable to find a copy of it. (Tr. 236-237).

arrested, Apuzzo admitted that Watterson asked him who his source for the firearms was, but denied telling him that they were wasting each other's time. (Tr. 233-234). Apuzzo testified that he told Watterson that he could identify the individual who sold him the firearms, if he saw him. (Tr. 236).

During Apuzzo's testimony, evidence that he had pleaded guilty to the transportation and possession of untaxed cigarettes in New Jersey, a misdemeanor under New Jersey state law, was introduced to impeach his credibility. (Tr. 207-208, 236).

Steven and Lucy Gogliettino, Apuzzo's brother-in-law and sister, provided corroborative testimony regarding the sale by Apuzzo of Gogliettino's firearms in December 1975. (Tr. 241-243, 246-248). In addition, both Gogliettinos testified that they had received telephone calls for Apuzzo at their house from someone named Robin. (Tr. 243-245, 248-249).

The jury deliberated for less than two and one-half hours before returning a verdict of guilty.

ARGUMENT

I.

The trial court properly admitted evidence of Apuzzo's prior misdemeanor conviction, which was related to his veracity, for the purpose of attacking his credibility.

The trial court allowed the Government to impeach Apuzzo's credibility as a witness by introducing evidence of his 1975 misdemeanor conviction in New Jersey for

the possession and transportation of untaxed cigarettes.[9] This decision was entirely consistent with Rule 609(a) of the Federal Rules of Evidence and in keeping with this court's holdings with respect to the reception of impeachment evidence.

Rule 609(a)(2) provides for the introduction of evidence of a misdemeanor conviction to impeach a witness' credibility if it involved "dishonesty or false statement."[10] The Conference Committee explained this phrase as follows:

> By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or fake pretense, *or any*

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[9] Prior to receiving this evidence, the trial court held a hearing on Apuzzo's motion out of the presence of the jury to determine the admissibility of any prior convictions. (App. 44-55). The Government sought to introduce evidence of a Connecticut state felony conviction in 1961 for aggravated assault and carrying weapons in a motor vehicle, a federal firearms conviction in 1962, a Connecticut state conviction in 1969 for the possession of stolen merchandise, and the subject New Jersey state misdemeanor conviction in 1975. The trial court disallowed introduction by the Government of all but the last conviction. (App. 54).

[10] Rule 609(a) of the Federal Rules of Evidence, Title 28, United States Code, states in its entirety:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

> *other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.* (Emphasis supplied).

Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. (1974), 4 U.S. Code Cong. & Adm. News 7098, 7103 (1974). Contrary to Apuzzo's assertion (Appellant's Brief, at 14), this explanation by no means necessarily limits the application of the rule to a narrow and well-defined class of offenses, for the considerable debate over the precise meaning of the terms "dishonesty" and "false statement", which preceded adoption by the Conference Committee of its report, discloses a divergence of views as to which offenses were in the nature of *crimen falsi* and which crimes involved an element of deceit or untruthfulness.

Mr. Hogan, for example, during the debate on Rule 609(a) in the House, expressed the view that the concept of "*crimen falsi*" was unpredictable and recognized that it might be applied differently in the various districts:

> What, really, is dishonesty or false statement in judicial or legal terms? Unless one practices in a jurisdiction which has a statutorily defined *crimen falsi*, the common law definition of "any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud" is applicable. This definition has been held to include forgery, perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to procure the absence of a witness or to accuse of crime, obtaining money under false pretenses, stealing, moral turpitude, shoplifting, intoxication, petit larceny, jury tampering, embezzlement and filing a false estate tax return. In other

> jurisdictions, some of these same offenses have been found not to fit the *crimen falsi* definition.

120 Cong. Rec. 2376 (1974).

Mr. Dennis explained that a crime which involves dishonesty or false statement is a crime which bears on a witness' credibility. 120 Cong. Rec. 2377 (1974). Mr. Wiggins further explained:

> The thrust of "dishonesty" as used in this bill goes to his [a witness'] veracity and his ability to relate the truth.

120 Cong. Rec. 2379 (1974).

Mr. Danielson remarked that "dishonesty" and "false statement" are not necessarily the same and that in his opinion the term "dishonesty" is much broader than "false statement". 120 Cong. Rec. 2379-2380 (1974). He commented as follows:

> Who can state that murder does not involve dishonesty? Who can, for instance, say stealing does not involve dishonesty? If stealing does not involve dishonesty, then what does it involve?
>
> The terms "dishonest" and "false statement" are not synonymous as used in this code section, and to the extent that we are establishing legislative history here, I want today to make it clear that when I voted for this bill out of committee, and when I vote for it today, it was and is my intention that the term "dishonesty" is broader than "false statement," and any offense involving moral turpitude such as stealing, robbery, burglary, or what have you, in my opinion is an offense involving dishonesty.

> I want to make the record eminently clear that I do not equate "dishonesty" precisely with "false statement."

120 Cong. Rec. 2380 (1974). The floor debate which followed is instructive:

> MR. DENNIS: Mr. Chairman, I would agree with my friend that dishonesty is a bit broader than false statement, but I would not agree that it covers such things as crimes of violence. What we are getting at here is *crimen falsi*, in the technical language, perjury, false pretense, fraud, and perhaps some other things.
>
> MR. DANIELSON: Moral turpitude.
>
> MR. DENNIS: It goes to one's honesty and one's credibility, and it does not cover the waterfront on all crimes for which a person can be sent to jail in excess of a year such as my friend from Maryland (Mr. Hogan) wants to do.
>
> MR. DANIELSON: Mr. Chairman, I am pleased to agree with the gentleman from Indiana that it involves that which shall be generally regarded as a dishonest act.
>
> * * * * *
>
> MR. HOGAN: Mr. Chairman, the courts have not borne out the gentleman's interpretation of what is dishonesty. The courts have sometimes rejected under this same guideline robbery, theft, and many other crimes that under the gentleman's definition would be considered "dishonesty."
>
> MR. DANIELSON: Mr. Chairman, I submit that, if the gentleman please, with the courts aided by this colloquy on the floor as to what the Congress means when it says "dishonesty", they will be able to apply the rule correctly.

120 Cong. Rec. 2380 (1974).

Mr. Dennis and Mr. Hogan also expressed their views before the Senate Judiciary Committee which was considering the House's bill. Hearings on Federal Rules of Evidence Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., at 13-26 (1974). There, Mr. Dennis explained:

> We have limited cross-examination as to prior convictions directed . . . to those crimes which by their nature actually do bar upon credibility . . .

Id., at 13, 24. In response to a question posed by Senator Ervin, Mr. Hogan offered the view that a prior conviction for auto theft was a *crimen falsi*. *Id.*, at 15. Mr. Dennis responded as follows:

> In my opinion, *crimen falsi* includes such matters as perjury, false pretense, con games, embezzlement, some types of theft, probably not to a car theft—certainly not crimes of violence.

Id. Mr. Hogan expressed his concern by formal statement that the words "dishonesty" and "false statement" are not clearly defined and that they would be applied differently in the various jurisdictions. *Id.*, at 26. Thus, he stated:

> . . . argument can be made that some kinds of offenses which are normally thought to involve dishonesty do not involve dishonesty on the facts and would not be usable to impeach the credibility of a witness convicted of such offenses.

The foregoing clearly demonstrates, we submit, that although Congress limited the admissibility for impeachment purposes of misdemeanor convictions to those offenses which relate to a witness' honesty and credibility, it did not define in an all-inclusive manner which par-

ticular acts were so related. Rather, the debate both on the floor of Congress and in committee hearing reveals that Rule 609(a) was passed with the understanding that the question of which crimes involve dishonesty or false statement and which offenses are in the nature of *crimen falsi* may be subject to some degree of interpretation by the courts.[11] *Cf.* 3 Weinstein's Evidence ¶ 609[03], at 609-65 (1975). Thus, while Rule 609(a) may change prior law to the extent that it disallows the introduction of misdemeanors not related to veracity, it does not, we submit, change the law with respect to what "veracity" means.[12]

The law in this circuit with respect to the subject conviction is clear, for Judge Lumbard recently held that a

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[11] Courts have, in fact, already reached opposite conclusions with respect to whether the identical misdemeanor involves dishonesty or not. *Compare, e.g.*, the opinion in *United States* v. *Carden*, 529 F.2d 443, 446 (5th Cir.), *cert. denied*, —U.S.—, 97 S. Ct. 134 (1976), holding evidence of a defendant's prior petty larceny conviction admissible because it involved dishonesty, with the decision in *Government of Virgin Islands* v. *Toto*, 529 F.2d 278, 281 (3d Cir. 1976), ruling inadmissible evidence of a petty larcency conviction because it was not a misdemeanor in the nature of *crimen falsi*. Although neither court was bound by Rule 609(a), inasmuch as both cases on appeal were tried before the Federal Rules of Evidence became effective, each court cited Rule 609(a) in support of its decision. It is interesting to note, as did Judge Zampano (App. 51), that the Third Circuit in *Toto*, *supra*, 529 F.2d at 281 n.2, characterized this court, along with the District of Columbia, Fourth, Fifth, Sixth and Tenth Circuits, as being more liberal in the reception of impeachment evidence.

[12] Apuzzo's reliance upon the decisions in *Kaufman* v. *Edelstein*, 539 F.2d 811 (2d Cir. 1976) and *United States* v. *Zubkoff*, 416 F.2d 141 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970), for the proposition that Rule 609(a) "effects two changes in the prior law of this Circuit" (Appellant's Brief, at 15) is misplaced, for neither opinion dealt with Rule 609(a).

New Jersey conviction for transporting and possessing untaxed cigarettes, the identical offense of which Apuzzo was convicted, is a crime which relates to a witness' veracity and which is, therefore, properly admissible for attacking credibility. *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974).[13] Nothing in Rule 609(a) changes the law in this circuit with regard to whether this offense is a crime involving dishonesty. Judge Zampano's decision allowing the Government to introduce evidence of Apuzzo's misdemeanor conviction was, therefore, entirely proper and wholly in accordance with Rule 609(a)(2).

Even assuming, *arguendo*, however, that the trial court erred in permitting the introduction of this conviction, it was harmless error at most, for, as Judge Weinstein recognized in his treatise on the Federal Rules of Evidence, relatively little prejudice should attend the introduction for impeachment purposes of any misdemeanor conviction.[14] 3 Weinstein's Evidence, *supra*, at 609-65-609-66. *Cf. United States* v. *Carden*, *supra*, 529 F.2d at 446. Moreover, in this case the prosecutor mentioned Apuzzo's conviction only briefly at the close of cross-examination (Tr. 236) and made no reference to it at all in summation. Here, where evidence of guilt was strong, as indicated by the jury's deliberation of only a few hours, there is no occasion to reverse Apuzzo's conviction

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[13] *See also, United States* v. *Reed*, 526 F.2d 740, 743 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976), in which this court found that a conviction for the criminal possession of stolen property was probative evidence on the issue of credibility.

[14] The jury was cautioned by Judge Zampano during his charge that the conviction in question was not a felony conviction. (App. 19).

and grant a new trial.[15] *See United States* v. *Zubkoff*, *supra*, 416 F.2d at 144.

II.

The trial court properly permitted the Government to cross-examine its informant regarding Apuzzo's prior dealings in firearms, where the defense of entrapment was asserted.

Apuzzo contends that the trial court erred in allowing Bourgeois to testify about other crimes which, in his opinion, Apuzzo was committing. This claim is without substance, for the Government never asked Bourgeois about Apuzzo's activities with respect to *other* crimes but only with regard to his prior dealings in firearms.

The contested exchange is as follows (App. 59):

By Mr. Cuthbertson:

Q. What was your motive for contacting them [law enforcement authorities]?

MR. BOWMAN: Objection. Irrelevant.

THE COURT: Overruled.

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[15] Contrary to Apuzzo's contention (Appellant's Brief, at 16-17), for which he cites no authority, his prior misdemeanor conviction for the transportation and possession of untaxed cigarettes is, we submit, completely dissimilar from the firearms offense with which he was charged. Judge Zampano, moreover, carefully instructed the jury that the evidence of Apuzzo's misdemeanor conviction was merely a circumstance which could be considered in determining his credibility. (App. 19). Plainly, the jury was not "likely to slip into the belief that the crime alleged was merely a repetition of one previously proven." *United States* v. *DeAngelis*, *supra*, 490 F.2d at 1009.

A. Well, I—in the past two years, I have been looking forward to a career in law enforcement, and any chance that I had to learn, to observe, to participate in law enforcement, I would take. And seeing that a crime was being committed, I—

MR. BOWMAN: Object to that.

THE COURT: Overruled.

A. —I was determined to see that something was done about it.

Q. Well, with specific reference to this case, what crime did you think was being committed?

MR. BOWMAN: Objection. That's irrelevant.

THE COURT: Overruled.

A. The crime itself, what appeared to me, was stolen articles were being fenced to—

Q. Now, with reference to this case.

MR. BOWMAN: I object.

A. Reference to this case.

When the exchange is read in its entirety, it is clear that the Government sought to elicit from Bourgeois an answer relating to his prior dealings with Apuzzo relating to the sale of *firearms*. This question was proper, for where, as here, the defense of entrapment is raised, it has long been held that the defendant "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932); *Cf. United States* v. *Cohen*, 489 F.2d 945, 950 (2d Cir. 1973); *United States* v. *DeCico*, 435 F.2d 478, 486 (2d Cir. 1970) (Lumbard, *C.J.*, concurring); *United States*

v. *Bishop*, 367 F.2d 806, 809 n.5 (2d Cir. 1966). The fact that Bourgeois' answer was not responsive to the prosecutor's question does not thereby render the question improper or the trial court's ruling on the objection thereto erroneous.

Indeed, the transcript shows that once it became evident that Bourgeois was not limiting his response to what was asked, the prosecutor attempted to cut off the answer and sought to restrict Bourgeois to answering the original question. Judge Zampano immediately instructed the jury that any references by the witness to other crimes were irrelevant to the question of Apuzzo's guilt or innocence with respect to the present charge. (App. 61-62).

Under these circumstances, we submit, the trial court's immediate and thorough instruction was sufficient to cure whatever prejudice may have resulted from this witness' single answer.

III.

The prosecutor's closing argument did not deny Apuzzo a fair trial.

Apuzzo complains that the prosecutor's summation was improper and prejudiced his right to a fair trial. The Government's closing argument was, we submit, well within the standards enunciated by this court and entirely proper in light of the defense presented and defense counsel's own summation.

Commenting upon the role of a federal prosecutor, Mr. Justice Sutherland noted:

> The United States Attorney is the representative not of an ordinary party to a controversy, but

> of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. *United States*, 295 U.S. 78, 88 (1935). This does not mean, however, that a prosecutor is restricted to a "sterile recitation of uncontroverted facts." *United States* v. *Keane*, 522 F.2d 534, 560 (2d Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). Indeed, as this court explained in *United States* v. *Wilner*, 523 F.2d 68, 74 (2d Cir. 1975):

> A prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury. He is an advocate who is expected to prosecute diligently and vigorously, albeit without appeal to prejudice or passion.

In this regard, the prosecutor is entitled to marshal all the inferences which the evidence supports and to analyze fairly the facts in an attempt to persuade the jury. *United States* v. *Wilner*, *supra*, 523 F.2d at 73; *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *Toles* v. *United States*, 308 F.2d 590, 593 (9th Cir. 1962). He may also summarize a witness' testimony and argue why it should or should

not be believed. *United States* v. *Keane*, *supra*, 522 F.2d at 561; *United States* v. *DeAngelis*, *supra*, 490 F.2d at 1008. Indeed, counsel for both sides have broad limits within which to argue the inferences which they desire the jury to draw from the evidence. *United States* v. *Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). It is settled, moreover, that a prosecuting attorney's summation must be considered in the context of the entire trial. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 639 (1974); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242 (1940); *United States* v. *White*, *supra*, 486 F.2d at 207. Viewed in this context, the record demonstrates that the prosecutor's summation did not exceed the bounds of permissible argument.

Apuzzo objects (Appellant's Brief, at 23) to the prosecutor's submission to the jury that a conversation between Apuzzo and Petersen, to which Petersen had testified, in which Apuzzo had indicated that he had access to thirty additional pistols, was significant. In this instance, the prosecutor did no more than provide the jury with a fair analysis of the evidence and argue the inference which it supported.

Apuzzo's contention (Appellant's Brief, at 23) that the prosecutor characterized him as a criminal is wholly without substance, for a review of the entire passage in which the alleged characterization appears (App. 31) discloses that no reference was made to Apuzzo at all. Rather, the prosecutor was offering to the jury a general explanation of the defense of entrapment. When read in context, the phrase "the defendant or another criminal", to which Apuzzo now complains, clearly refers to *a* defendant or *a* criminal in general. The prosecutor intended and in fact made no statement that Apuzzo

as the defendant in this case was or should be considered in any way a criminal.[16]

Apuzzo's complaint (Appellant's Brief, at 23-24) that the prosecutor improperly vouched for the truth of the Government's witnesses is without merit. The instances cited (App. 33, 35) amount to nothing more than fair comment upon Apuzzo's credibility and the defense he presented. *See United States* v. *Torres*, 503 F.2d 1120, 1127 (2d Cir. 1974); *United States* v. *DeAngelis*, *supra*. The claim (Appellant's Brief, at 24) that the prosecutor implied that defense counsel had participated in a fabrication is clearly not supported by the record and, in any event, ought not to be inferred as the prosecutor's intended meaning. *See Donnelly* v. *DeChristoforo*, *supra*, 416 U.S. at 637.

Apuzzo attacks (Appellant's Brief, at 24-25) the prosecutor's use during rebuttal of the word "preposterous"[17] in characterizing his testimony and the prose-

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[16] Should this remark be viewed as ambiguous, which we submit it is not, the Supreme Court recently advised that ". . . a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly* v. *DeChristoforo*, *supra*, 416 U.S. at 637. *See also United States* v. *Johnson*, 527 F.2d 1381, 1384 (D.C. Cir. 1976).

[17] Apuzzo's reliance upon the opinion in *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973), for the proposition that the use of the word "preposterous" is reversible error is without force. There, the court had occasion to review for the third time repeated instances of improper conduct of the same prosecutor. That, plainly, is not the case here. *See United States* v. *Canniff*, 521 F.2d 565, 572 n.6 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). The instances complained of here, moreover, bear no resemblance to those which were condemned in *Drummond* or in *United States* v. *Burse*, 531 F.2d 1151 (2d Cir. 1976), upon which Apuzzo also relies.

cutor's assertion that Apuzzo had not been singled out of the general populace for prosecution. (App. 38, 39). These remarks, however, must be considered in light of defense counsel's own rather emotional[18] attack upon the Government's integrity in his closing argument. (G. App. 1a-8a).* For example, defense counsel argued (G. App. 2a-3a):

> The prosecution didn't call him [Robin Bourgeois] as a witness not only because they don't want you to see him or know about him, but because they're ashamed of it and they're ashamed of what they did and of how they used him and of what he did to Jim Apuzzo. From late August of 1975 Robin Bourgeois, Charlie Prince asked for guns, pistols, rifles, shotguns, sawed-off shotguns, heavy weapons. "We'll pay top dollar. We have people in Boston." They led him on. They led him on. They kept the pressure up. Personal contact. Phone calls. They were working on him. They did their best. They used every trick in the book. They used every trick to put Jim Apuzzo into a business that they now call a crime. They used trickery. They used cunning. They used Robin Bourgeois. By his own testimony he says so. "I was a friend of his." They laid out the bait. They set the trap.

Clearly, in view of this type of argument, the prosecutor's limited response was wholly justified and proper. *See Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958); *United States* v. *Wilner*, *supra*, 523 F.2d at 74; *United*

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[18] Judge Zampano himself characterized defense counsel's summation as competent, appealing and emotional. (App. 42).

* References marked "G. App." refer to the Government's appendix.

States v. *Tramunti*, 513 F.2d 1087, 1118-1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *DeAngelis*, *supra*, 490 F.2d at 1011-1012 (Mansfield, *J.*, concurring); *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973); *United States* v. *Santana*, 485 F.2d 365, 370-371 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Benter*, 457 F.2d 1174, 1176 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

In this case, as is customary, the prosecutor advised the jury that his argument was not evidence (App. 25), a point which the trial judge had previously mentioned (App. 23). Judge Zampano instructed the jury, moreover, that *it* was to recollect and weigh the testimony and draw its own conclusion as to what the facts are. (App. 7). Considered in the context of the defense which Apuzzo presented, the attack upon the Government's witnesses and defense counsel's own closing argument, the prosecutor's summation was not such "plain error", Fed. R. Crim. P. 52(b), as to require a new trial.[19] *United States* v. *Canniff*, *supra*, 521 F.2d at 572; *United States* v. *Bivona*, *supra*, 487 F.2d at 445; *United States* v. *Santana*, *supra*, 485 F.2d at 371.

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[19] In this regard, the only objection, now raised on appeal, which Apuzzo made at trial to the prosecutor's summation was the use of the word "preposterous".

IV.

The Government presented more than ample evidence upon which a reasonable mind might fairly conclude beyond a reasonable doubt that Apuzzo was predisposed to commit the offense charged.

Apuzzo contends that the Government's evidence of his propensity and willingness to commit the offense charged was insufficient to overcome the evidence which he introduced purporting to show entrapment. It is well settled, however, that when a claim that the evidence at trial was insufficient as a matter of law to sustain a conviction is raised on appeal, the evidence and the inferences to be drawn therefrom must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Chestnut*, 533 F.2d 40, 48 (2d Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 88 (1976); *United States* v. *Brasco*, 516 F.2d 816, 817 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Tramunti*, 500 F.2d 1334, 1339 (2d Cir. 1974). Any conflicts in the evidence, therefore, must be resolved in favor of the prosecution. *United States* v. *Cachoian*, 364 F.2d 291, 292 (2d Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); *United States* v. *Rodriguez*, 546 F.2d 302, 306 (9th Cir. 1976). A jury's verdict will be sustained, moreover, where a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *United States* v. *Chestnut*, *supra*; *United States* v. *Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). Viewed in this light, Apuzzo's claim clearly has no substance, for the Government presented evidence that it was Apuzzo who made the initial contact with Bourgeois regarding

the sale of firearms and who not only eagerly engaged in and carried out a number of transactions with government agents but willingly sold firearms to other persons as well.

For example, Robin Bourgeois testified that it was Apuzzo who had first mentioned the subject of firearms to him by indicating that he had a number of items, including firearms, for sale. (Tr. 187, 203-204). Bourgeois testified that his first attempt to arrange a meeting between Petersen and Apuzzo in October 1975 was unsuccessful because Apuzzo needed money quickly and sold the firearms which he then had to someone else. (Tr. 190-191). Bourgeois testified that prior to the sales in November and December 1975, it was Apuzzo who called him to advise that he had firearms for sale. (Tr. 191-192). Bourgeois testified that prior to the final sale in April 1976, Apuzzo again called him and indicated that he had additional firearms to sell but that he had been unable to contact Petersen himself. (Tr. 190). Bourgeois stated that during the course of the investigation he had not called Apuzzo more than once every one or two weeks. (Tr. 188).

Special Agent Petersen testified that during the first meeting with Apuzzo on November 1, 1975, Apuzzo asked whether he could take any additional rifles. Petersen testified that Apuzzo indicated that he thought he could procure handguns as well. (Tr. 64). Petersen testified that again during the meeting in December 1975, Apuzzo asked whether he could handle additional rifles and said that he might be able to obtain such firearms as sawed-off shotguns and machine guns. (Tr. 65).

Petersen and Special Agent Watterson testified that during their meeting on February 26, 1976 with Apuzzo,

he inquired whether the two agents would be interested in an additional thirty pistols. (Tr. 19, 141). Petersen stated that during a conversation with Apuzzo on March 16, 1976, Apuzzo indicated that he had had a few small handguns but "got rid of" them somewhere else because he didn't think Petersen would be interested. On this occasion, Petersen testified, Apuzzo told him that he had a friend who was going to get five .44 Magnum revolvers and would let Petersen know when they came in. (Tr. 22-23). Both Petersen and Watterson testified that during the final sale on April 6, 1976, Apuzzo said that he could sell one hundred Colt Cobra revolvers if he had them.

The foregoing testimony, we submit, provided more than ample evidence from which the jury could fairly conclude beyond a reasonable doubt that Apuzzo was ready and willing without persuasion to commit the offense charged. Contrary to Apuzzo's assertion (Appellant's Brief, at 28) there was sufficient evidence from which the jury could infer that prior to November 1, 1975, he was dealing in firearms without a license. Bourgeois' testimony regarding how Apuzzo initially brought up the subject of firearms with him and how Apuzzo completed a firearms transaction in October 1975 with someone other than Petersen clearly supports the inference that he was dealing in firearms during this time. The testimony of Petersen and Watterson, moreover, regarding their dealings with Apuzzo, his stated ability to procure and dispose of any number of firearms and his indication to Petersen that he had in fact gotten rid of several handguns because he didn't think Petersen would be interested supports the conclusion that Apuzzo not only dealt with them but with other persons as well. This evidence, we submit, in addition to showing an existing course of criminal con-

duct, demonstrated an already formed design and an undisputed willingness on Apuzzo's part prior to November 1, 1975 and throughout the investigation to deal in firearms without a license. *See United States* v. *Anglada*, 524 F.2d 296, 299 (2d Cir. 1975). The jury clearly was entitled to conclude beyond a reasonable doubt that Apuzzo was guilty.

CONCLUSION

For all of the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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GOVERNMENT'S APPENDIX

Defense Counsel's Summation

THE COURT: Mr. Bowman.

MR. BOWMAN: Thank you, your Honor.

Good morning, ladies and gentlemen. My name is Andy Bowman and I represent the defendant, Jim Apuzzo. I get just this one opportunity to speak with you. It's the way the law is. So I would appreciate it if you would give me the same type of attention that you have given throughout the course of this trial, and I want to thank you for that attention and your concern in this case.

Ever since this trial began I've been thinking about what has made the American people so unique and what has made our country with all its shortcomings after two hundred years so unique. Still a democracy. Why? I think it's because the people of this country have a sense of honor, have a sense of justice, have a sense of decency, a sense of what the government should and should not do.

To Jim Apuzzo this case is of tremendous importance, but I hope that you feel that this case is of tremendous importance to you, too. Because it is uniquely a test of fairness and a test of justice.

Last Wednesday, two days ago, the prosecutor called Charles Petersen to the stand and we heard him admit that in December he met the defendant in Hamden, the time the defendant sold his brother-in-law's guns. He asked the defendant, "Get me sawed-off shotguns. Do you have any heavy weapons?" Then the prosecutor, deliberately, one by one, gun after gun after gun after gun after gun, one at a time, paraded these guns in front of you. And he's got them draped on this table

this morning. And why? It's a strategic decision to upset you. To have you concentrate on the fact that these are guns.

Well, they're guns. Anybody can see that they're guns. But I think it was even Judge Zampano who later said to the prosecutor when Mr. Watteson was on the stand, "Why don't you just have him get up and come over and identify the guns?" It would have served the same purpose. But instead, he wanted to parade the guns around the courtroom.

Throughout the examination of Agent Petersen he never mentioned Robin Bourgeois, and if the defense hadn't called him as a witness and if the defense had not brought up his name on cross-examination you would never have heard of him or from him. You would have never known that he received $50.00 by the end of 1975 and you would never have known that he received an additional $20.00 in March and you would never have known that he received an additional $250.00 after he had made this case.

The prosecution didn't call him as a witness not only because they don't want you to see him or know about him, but because they're ashamed of it and they're ashamed of what they did and of how they used him and of what he did to Jim Apuzzo. From late August of 1975 Robin Bourgeois Charlie Prince asked for guns, pistols, rifles, shotguns, sawed-off shotguns, heavy weapons. "We'll pay top dollar. We have people in Boston." They led him on. They led him on. They kept the pressure up. Personal contact. Phone calls. They were working on him. They did their best. They used every trick in the book. They used every trick to put Jim

Apuzzo into a business that they now call a crime. They used trickery. They used cunning. They used Robin Bourgeois. By his own testimony he says so. "I was a friend of his." They held out the carrot. They held out the bait. They set the trap.

But things weren't working well. They weren't getting their sawed-off shotguns. They weren't getting their sales in 1975. They called him in October, called him in November, called him in December. Met with him. Jim Apuzzo told Robin, "I don't deal in firearms. This is not my business. And what's in it for you anyway?" "Oh, I get a piece of the action," says Robin. He not only got a piece of the action, but he created. Do you remember Robin's testimony? No dates, no times, no details. No clear recollection. Because he doesn't want to remember. As a matter of fact, he wanted out of this. He had done his deed, and now he wanted anonymity.

Before lunch yesterday he said, "Yes, I tricked Jim Apuzzo." But after lunch, "No, I didn't trick him. I didn't trick him." He tricked him for money and he tricked him for recognition in the eyes of the police and in the eyes of federal agents. Far from anonymity, he sought recognition. He had to discuss his approach with Agent Petersen because it wasn't working. "Should we change the tactic? How can I approach him? How can I get him to get those guns? How can I vindicate my opinion?" And you know there was no evidence that Jim Apuzzo ever suspected Robin or Charlie Prince of being government agents. Which might make him reluctant. They had him conned, but he wasn't producing. He wasn't getting them their guns.

Defense Counsel's Summation

Mr. Cuthbertson would rather have you take a look at 1976 in a vacuum and say, "Well, look at before." But this started in late August of 1975 and started with Robin Bourgeois going up to a man he worked with at the New Haven Register, a man who had sold him things like perfume, like purses, to make 30 cents on an item which he bought in a variety store. And Robin was convinced this was his victim. This was the guy who's going to get him recognition. This is the guy who's going to make him some money.

Contrast the testimony of Robin with that of the defendant. Who answered questions on direct examination in detail? The only question the prosecutor asked Jim Apuzzo, "Do you deny this? Do you deny that?" That's a lawyer's trick, that's not a question. He's not looking for an answer, he's just seeking to reinforce and to bootstrap the testimony that he wants you to believe.

And the only reason Jim Apuzzo denied it was because it's not true. The Judge will charge you that you must view a paid informant's testimony with great care and with great caution. And the reason is as follows: Because he's been paid. And he's been paid for his inducement of the defendant. And he has an ongoing interest in the outcome. Secondly, because of his prejudice. Because in his mind a year ago Jim Apuzzo was some kind of a criminal. Or at least that he could, he felt, make him into a criminal. And finally because a conviction of Jim Apuzzo would be a vindication of Robin Bourgeois' belief.

So you must in the interest of fairness analyze what he did, what he said, both here in the courtroom and what he did over the last eight months before the arrest.

Defense Counsel's Summation

Would an agent who was trained in deceit, in trickery on the street use his training here in the courtroom? That's a question you have to answer.

When you analyze the testimony of Charlie Prince or Charles Petersen, who were you listening to? Whose credibility are you testing? Whose testimony are you weighing? Were these conversations what the agents were offering? What they were asking him for? Or was it as they claim, that he was telling—if he had these guns that they claim that he talked to them about, "Where are—" as Robin put it—"Where are the buys?" "I don't use that term." That's Mr. Bourgeois. That's the would-be law enforcement agent. "That's his term." Where's the proof?

In October of 1975 things weren't easy in Jim Apuzzo's household. He wasn't working. And not working weakens a man's will. He was helping out his sister and her husband financially, and he sold their guns for them in December. And all through this time Robin is working on him, and Charlie Prince is working on him, and they're calling, and they want sawed-off shotguns and they want rifles and the rest. So finally in April they won. It took eight months—six months. They put him in business. They created him. Finally they did it. And they broke him for it. Robin got his money. Petersen made his case. And now they expect you to write the last chapter. They want your rubber stamp.

No twinge of conscience. No questions asked. Is Robin Bourgeois and what he did and how the agents used him and how they made him, is that what you want law enforcement to be in this country? Is that

your idea of how things should be done? Is it fair for the government to induce a person to commit a crime? To work on him? To pressure him? To con him? To trick him?

They really wanted him to commit a crime involving sawed-off shotguns because possessing a sawed-off shotgun is a felony in and of itself. Because a shotgun, a sawed-off shotgun's an illegal weapon. Like a drug. But these guns anybody can own. Even the agent said that. You could buy or sell one or two or three, up to ten. And according to the agent—the Judge gives you the law—but according to the agent, in his opinion, and he's the law enforcement agent, you could do that without a license. But it depends on your intent. That's what the agent said. What kind of a law is that? I don't know. But if what the agent says is true—and I don't quarrel with it—the question of inducement by a paid informant and by Charlie Prince becomes of tremendous importance.

This is not a case where the gun itself is illegal. This is not a case where you have an illegal drug being possessed by somebody. In order to convince anybody—prosecutor, a jury—that a crime's been committed they need numbers. And finally after months of working on him and working on him and calling him and meeting him and promising him money, and top dollar, and constant pressure, they got their numbers.

The government has tremendous manpower. They have tremendous resources. With our tax dollars. They don't need to create crime. They don't need people like Robin Bourgeois. The government must prove beyond

a reasonable doubt that the inducement by Robin Bourgeois of this offense was not the cause of the crime. From what you heard—the phone calls, promises, the trickery, the cunning, the deceit—have they met their burden? Or the standards you expect of law enforcement in this country?

I ask you to acquit Jim Apuzzo. Because he's no dealer. Because if he's committed a crime, it was a crime that was induced and created by an informant. And because the public has a right to expect higher standards than the taking of a workingman with a family and making a criminal out of him.

Thank you.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1015

UNITED STATES OF AMERICA

Appellee

v.

JAMES APUZZO

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 20th day of April, 1977, deponent served the within Brief and Appendix for the Appellee upon Andrew B. Bowman, Esq.; Federal Public Defender 770 Chapel Street, New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 20th day of April 1977

NEIL SZNITKEN
Notary Public, State of New York
No. 41-4505652
Qualified in Queens County
Commission Expires March 30, 1979